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Supreme Court of the United States

OCTOBER TERM, 1940

No. 640

THE UNITED STATES OF AMERICA and SECRETARY OF AGRICULTURE, APPELLANTS,

vs.

ALICE M. MORGAN, Administratrix of the ESTATE of F. O. MORGAN, DECEASED, *et al.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

APPENDICES
TO
BRIEF FOR APPELLEES

FREDERICK H. WOOD,
JOHN B. GAGE,
THOMAS T. COOKE,
Counsel for Appellees.

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APPENDIX A

(Letter of Henry A. Wallace, as published in *The New York Times*, issue of May 8, 1938; Pet. Ex. 5, see R. 371; Repr. of Exs. pp. 382-393.)

TO THE EDITOR OF THE NEW YORK TIMES:

THE NEW YORK TIMES on pages 1 and 2 of the Sunday issue of May 1 and on the editorial page of the issue of May 2 unwittingly committed an injustice against the Department of Agriculture and the present Secretary of Agriculture. According to THE NEW YORK TIMES the decision in the Kansas City rate case handed down on April 25, "Rebuked Wallace" and "intimated that the stock yards company was unfairly treated." In another place, THE NEW YORK TIMES says, "the Supreme Court held that Secretary Wallace had accepted as his own the findings of the 'active prosecutors for the government' and had not given the packers the right to a full and fair hearing in the proceedings, which involved the establishment of maximum rates for livestock sales commissions in Kansas City."

It is not surprising that reporters for THE NEW YORK TIMES, who are undoubtedly among the best in the country, should have been deceived. I have found that even the most prominent people in the Administration, whose duty it is to keep up to date on current affairs, were misled by the curious way in which the April 25 decision of the Supreme Court was written by Chief Justice Hughes. The court's cloudy phraseology was made necessary by the fact that two years previously the Chief Justice in this same case had taken a different stand and there was necessary a careful

job of legal reconciliation which confused the clarity of thought.

Practice Followed

The very heart of the decision as stated by the Chief Justice in his April 25, 1938, pronouncement I believe to be sound. This has to do with furnishing to business men a definite order or set of findings, so that they may have something to shoot at before they appear in final argument. I agree that the practice followed in previous Administrations was unfair, and I am glad to say that nearly two years ago this department established the procedure which the Supreme Court now says is necessary.

It is interesting to note that the particular error of omission on which the Chief Justice hangs his decision was committed not by this Administration but by the previous one. It was the Solicitor of the previous Administration who failed in February or early March of 1933 to send out the order to the commission men so that they would have something definite to shoot at when they came in to the oral argument on March 24, 1933. I do not blame the Solicitor, because he was merely following the practice established in preceding Administrations. Old Deal lawyers did not have the opportunity of thinking so continuously about the problems of administrative law. Under the New Deal there has been much thought about perfecting the procedure of administrative law to insure fair play.

Credit to Dr. Mohler

Dr. John R. Mohler, Chief of the Bureau of Animal Industry, one of the most respected and fairest-minded men in the government, deserves credit for helping to bring about the necessary change in practice long before the decision of the Chief Justice in 1938. It is interesting to note that in May of 1936, when this case was up before the Supreme Court on a prior hearing, the Chief Justice in the

opinion which he handed down was not particularly concerned with whether or not an order had been sent to the commission men.

On that occasion the one matter which seems to have concerned him above everything else was whether or not the Secretary of Agriculture had sufficiently studied the evidence. To determine this point he sent the case back to the lower courts and asked that an investigation be made. An investigation was made, the Secretary of Agriculture was cross-examined and this point was settled to the Chief Justice's satisfaction.

Incidentally, I may say that Dr. Mohler tells me that I gave this case more personal attention than any previous Secretary of Agriculture had ever given to any case under the Packers and Stock Yards Act or for that matter to any half dozen cases. The Chief Justice in his 1938 decision quotes the statement in my testimony to the effect that I conferred with the men of the Bureau of Animal Industry and then reached an independent conclusion as a result of which I changed certain rates (in favor of the commission men, as it happens, although the Chief Justice did not so state).

Formed Own Opinion

The men of the Bureau of Animal Industry were of very real assistance to me in digesting the 10,000 pages of oral transcript and studying carefully the 1,000 pages of statistical exhibits. It was right that I should rely on them, because these men were employed among other things for just such a purpose. They were not the active prosecutors in the case, as has been assumed.

In 1928 the then Secretary of Agriculture divided the Packers and Stock Yards Administration into two parts. The legal part, composed of the active prosecutors, went to the Solicitor's office; the administrative and investigational section went to the Bureau of Animal Industry. I conferred separately and collectively with both groups. Their opin-

ions did not agree. I arrived at an independent opinion of my own.

All of this, however, is quite irrelevant and would not be in the 1938 decision at all if it had not been for the fact that in 1936 the Chief Justice sent the case back to the lower courts to find whether or not the Secretary of Agriculture had given the case sufficient personal study. Having found that the Secretary of Agriculture had given the case personal study, he shifted ground and placed the blame for the vital defect on the previous Administration, although in such words that the most skilled reporter or headline writer could arrive at no other conclusion than that the present Administration had been rebuked.

The confusion arises from the fact that in the decision the words, "Secretary of Agriculture" refer to several different individuals in two different Administrations and the distinction would not likely be caught by any one who is not in the Department of Agriculture.

Because of the fact that the Kansas City Rate Case decision is certain to have a far-reaching significance to governmental quasi-judicial agencies, I have in the following sketched the background of the legislation and the case involved.

Market History

Twenty years ago Senator John B. Kendrick of Wyoming, T. W. Tomlinson, secretary of the American National Livestock Producers, and Henry C. Wallace, my father, who was secretary of the Corn Belt Meat Producers Association, worked together strenuously for what they believed to be a new deal for stockmen at the great central markets. Previous to 1921 livestock marketed at the central markets was not subject to Federal regulation. The stockmen felt that the charges were too high and that many of the practices were unfair. They had tried cooperative marketing agencies, only to have them boycotted and destroyed. I myself had done statistical work for the Corn Belt Meat Pro-

ducers Association, and had written editorials on the need for Federal regulation.

When my father became Republican Secretary of Agriculture in 1921, his greatest interest was to bring about the passage of the Packers and Stock Yards Act. When the act became law he set up in the Secretary's office an administrative force. Thus was set up in the Department of Agriculture one of the first of its quasi-judicial agencies. At that time, aside from the Interstate Commerce Commission and the Federal Trade Commission, there were not many such agencies in the government.

As time went on corporation lawyers more and more developed a feeling that these governmental agencies were unfair. The point they made was that the government was simultaneously investigator, prosecutor and judge. And yet the growing power of corporations and the increasing complexities in modern economic life made the increased development of semi-judicial, semi-executive agencies inevitable.

Changed Procedure

Perhaps it was this growing feeling on the part of corporation lawyers which led the Secretary of Agriculture in 1928 to take the Packers and Stock Yards Administration out of the Secretary's office and put the prosecuting functions in the Solicitor's office and the fact-finding and administrative functions in the Bureau of Animal Industry. It is a curious comment on human affairs that the resentment which corporation lawyers had long held against quasi-judicial agencies in government should have received its most effective support from the Supreme Court in terms of condemnation of the action of an agency which had gone the whole way toward meeting the Supreme Court's objections.

I find this whole matter of unusual interest because two of the six justices who voted to take this action sat in the

same Cabinet with my father in the early Twenties. Both of them undoubtedly knew that the Packers and Stock Yards Act was an integral part of the Republican agricultural new deal of 1921. Both of them were doubtless familiar with the way my father had set up the original Packers and Stock Yards Administration. But it is doubtful if either of them knew about the change in 1928 when the Secretary allocated the legal functions to the Solicitor's office and the other functions to the Bureau of Animal Industry.

While I believe that knowledge of this fact would have caused some difference in the phraseology of the opinion, I do not contend that this knowledge would have reversed the verdict, because I am convinced that both liberals and conservatives on the court were eager to use the first opportunity to give a warning to the newer quasi-judicial agencies.

Hyde Set Rates

Really vigorous action in the reduction of commission rates did not begin until the depression of 1930. As the depression deepened, farmers became more and more disgusted to see commission rates held up nearly to the 1929 level, when the price of their livestock had been cut in half. They brought great pressure to bear on Assistant Secretary of Agriculture Dunlap, whom the Secretary, Arthur M. Hyde, had assigned to deal with such matters.

In April of 1930 Secretary Hyde ordered that the Kansas City commission rates be looked into. A representative of the Solicitor's office in the Department of Agriculture acted as an examiner, and took evidence in late 1930 and early 1931. Commission men appeared as witnesses, so also did investigators of the Bureau of Animal Industry. In March of 1931 oral arguments were held before Assistant Secretary Dunlap and in the Spring of 1932 the Secretary issued his findings and an order prescribing new rates.

Within a short time, however, the Secretary reached the conclusion that because of changed economic conditions these rates would not be enforced, but a new hearing would be held. The economic conditions had, of course, gone from bad to worse, and it is to be presumed that the then Secretary of Agriculture felt that the rates in his order were too high, and that a review of the economic situation would result in still lower rates. At any rate, an examiner was sent out from the Solicitor's office in the Fall of 1932 and both old and new evidence was submitted.

When the Democratic Administration came in in March of 1933, the function of listening to oral arguments under the Packers and Stock Yards case was still set up in the Assistant Secretary's office. On March 24, therefore, Rex Tugwell, the new Assistant Secretary of Agriculture, heard the oral argument with regard to the Kansas City rate case. Previous to that time, however, there occurred that which Chief Justice Hughes describes as a "vital defect" in the hearing. This defect, for which the previous Administration was solely responsible, consisted in the following: The commission men had not been given the right to look at the proposed order before they came to the argument.

Personally, I agree with Justice Hughes in this particular contention, as is shown by the fact that in 1936, nearly two years before Chief Justice Hughes's finding, I signed an order providing for procedure to enable appellants to see the proposed order at least twenty days before the oral argument. When I side with the Chief Justice in this conclusion I am not necessarily criticizing those who were Solicitors in the preceding Administrations and who felt that a full hearing did not require giving the commission men the right to see the order in advance so they would have something definite to shoot at in the oral argument.

But if the Solicitor of the preceding Administration could have had some sense of prophetic warning he could have saved to the farmers of the Kansas City area at least $700,000 which rightfully belongs to them and which will now go to the commission men and their attorneys.

So far as the Packers and Stock Yards Administration of the Department of Agriculture is concerned, the Supreme Court in its decision of April 25, 1938, has not served a useful purpose. We had already made the reform which the Supreme Court says should have been made by the preceding Administration.

So far as the farmers are concerned, they lost $700,000 which had been impounded as the difference between the rates established in the Secretary's order of 1933 and the old Kansas City rates based on the 1929 conditions.

So far as other quasi-judicial agencies in the executive branch of the government are concerned, it would seem that each must discover in its own way an appropriate mechanism for showing a full hearing to business men and corporations. In packers and stock yards procedure I was able to assure such a full hearing by making it a requirement that the proposed order be sent to the interested parties by registered mail at least twenty days in advance of time for oral argument. In the case of the Packers and Stock Yards Administration I do not anticipate that this requirement will result in any unnecessary embarrassment or delay.

Public Needs Protection

I can conceive, however, that with respect to certain fields of government activity corporation attorneys and reactionary judges might conceivably use this finding of the Supreme Court greatly to the advantage of the corporations and greatly to the disadvantage of the public. It would seem as though there is just as great a need for the public being fully and fairly heard as there is for the corporations.

In the Kansas City rate case the Supreme Court finding has the effect of doing a definite injustice to the public. Two extended sets of hearings before examiners were held, one in early 1931 and the other in late 1932. Two oral arguments were held, one in early 1931 and the other in

early 1933. Two findings were made and two orders were signed, one in May of 1932 and the other in June of 1933.

The change in economic facts between the examination of early 1931 and the examination of late 1932 was such as to justify lower rates rather than higher rates. Furthermore, in November of 1937, when economic conditions were materially better than in 1931, 1932 or 1933, the Kansas City commission firms voluntarily accepted rates almost identical with my order of June, 1933.

The evidence is clear, therefore, that the Supreme Court in order to flash a warning to quasi-judicial agencies in the executive branch of the government did that which those of us who are close to the industry know to be a definite injustice to the farmers involved. It will be exceedingly unfortunate if corporation lawyers take this finding of the Supreme Court as an excuse to bring about the interminable delays for which some of them are famous.

Injustice to Farmers

The final court of appeal in the United States is to the bar of public opinion. In bringing this present case before that bar I would raise the question as to the extent to which a court in its desire to call public attention to certain trends in public policy should permit itself to do a substantial injustice to a considerable number of citizens—in this case the farmers who had sent livestock to the Kansas City market from June of 1933 to November of 1937. They were harmed to the extent of more than $700,000 in order that the court might make it known that in quasi-judicial proceedings orders should be formulated and sent out to the appellants that they might have something to shoot at when the time came for oral argument.

With regard to this point I have no quarrel with the Chief Justice. But it does seem that he could have done justice to the farmers and at the same time have issued this warning I trust the day will come when the Supreme Court will recognize a menace far greater than that con-

tained in any of the quasi-judicial agencies—namely the tendency of some corporation lawyers and courts to drag out their proceedings to an interminable length.

In conclusion, we may well ask whether the court was interested in this case primarily from the standpoint of doing justice as between farmers and commission men in the Kansas City territory or in using a convenient peg on which to hang a statement encouraging lower courts to attack and delay the actions of quasi-judicial agencies. As I have said before, I agree fully with the Chief Justice about the fairness of sending out orders in advance of final oral argument in order that the appealing parties may have something definite to shoot at. But if the obiter dicta in this case are to be taken as an excuse for delay by the lower courts it is high time that the whole matter be agitated to the utmost before the bar of public opinion.

HENRY A. WALLACE.

Washington, D. C., May 3, 1938.

APPENDIX B

ARBITRATORS' AWARD

(Pet. Ex. 24, see R. 361)

Docket Nos. 11, 12, 13, and 14

AMERICAN NATIONAL LIVE STOCK ASSOCIATION, NATIONAL WOOL GROWERS' ASSOCIATION, ARIZONA CATTLE GROWERS' ASSOCIATION, ARIZONA WOOL GROWERS' ASSOCIATION, CALIFORNIA CATTLEMEN'S ASSOCIATION, CORN BELT MEAT PRODUCERS' ASSOCIATION, IDAHO CATTLE AND HORSE GROWERS' ASSOCIATION, MONTANA STOCK GROWERS' ASSOCIATION, NEBRASKA STOCK GROWERS' ASSOCIATION, NEVADA LAND AND LIVE STOCK ASSOCIATION, NEW MEXICO CATTLE AND HORSE GROWERS' ASSOCIATION, OREGON CATTLE AND HORSE RAISERS' ASSOCIATION, TEXAS AND SOUTHWESTERN CATTLE RAISERS' ASSOCIATION, UTAH CATTLE AND HORSE GROWERS' ASSOCIATION, WYOMING STOCK GROWERS' ASSOCIATION, COMPLAINANTS

v.

THE CHICAGO LIVE STOCK EXCHANGE, THE KANSAS CITY LIVE STOCK EXCHANGE, THE OMAHA LIVE STOCK EXCHANGE, THE ST. PAUL LIVE STOCK EXCHANGE, THE PORTLAND LIVE STOCK EXCHANGE; AND THOSE MARKET AGENCIES OPERATING AT THE STOCKYARDS AT CHICAGO, ILL.; KANSAS CITY, MO.; OMAHA, NEBR.; ST. PAUL, MINN.; PORTLAND, ORE.; AND FORT WORTH, TEXAS, THAT HAVE REGISTERED WITH THE SECRETARY OF AGRICULTURE UNDER SECTION 303 OF THE PACKERS AND STOCKYARDS ACT, 1921, DEFENDANTS

Report and Award of the Arbitrators Recommended to the Secretary of Agriculture

A formal complaint was filed with the Secretary of Agriculture on July 25th, 1922, under Title III of the Packers

and Stockyards Act, 1921. This complaint alleges, among other things, that the commission charges assessed and collected by the market agencies for selling livestock at the stockyards located at Kansas City, Mo., So. Omaha, Neb., So. St. Paul, Minn., and Chicago, Ill., are unjust, unreasonable, and discriminatory.

Before a date of hearing was ordered on this complaint, a conference was held between the representatives of the market agencies at the Kansas City market and representatives of the American National Livestock Association, Kansas Livestock Association, Missouri Livestock Association, Texas and Southwestern Cattle Raisers' Association, and other livestock organizations tributary to that market. This conference resulted in a proposal to the Secretary that the issues in dispute be settled by arbitration. The conference nominated arbitrators for the consideration of the Secretary in connection with this proposal. The proposed plan was approved by the Secretary of Agriculture. All parties to the proceedings and participants in the conferences in relation thereto, with the approval and consent of the Secretary, joined in an invitation to those nominated by them to act in the capacity of arbitrators under the following stipulation:

"In conference in regard to the matter of rates, charges, regulations, and practices now in force at the Kansas City market, it is proposed that all questions in regard to the above subject matter shall be submitted for adjustment to G. N. Dagger, Charge of the Division of Rates and Charges, and Howard M. Gore, Charge of the Trade Practice Division, Packers and Stockyards Administration, and it is agreed that their decision shall be accepted and made a part of the conference report, the same to be made effective by the Kansas City Live Stock Exchange upon approval by the Secretary of Agriculture. In performance of these duties, G. N. Dagger and Howard M. Gore may

proceed in such manner and by such means as they deem necessary, and shall be afforded such facilities and information as they may require for the proper discharge of their duties. And in order to effectuate the results of this conference, it is understood that the representatives of the commission men market agencies, the American National Live Stock Association, the National Wool Growers' Association, and the producers organizations, namely: Kansas State Live Stock Association, Texas and South Western Cattle Raisers' Association, Missouri Live Stock Association, and representatives of Oklahoma Live Stock Producers participating in this conference will approve this stipulation."

The persons chosen and named in the stipulations accepted the invitation to act as arbitrators and entered upon their duties as such. The arbitrators were aware that the tasks to be undertaken were in the nature of pioneer work and the complex character of the problems presented would necessitate extensive research and study. It was the opinion of the arbitrators that the problem could best be approached by informal conferences and hearings with the representatives of the producers and shippers and with the market agencies engaged in business at the market under consideration. It was the further belief of the arbitrators that the Auditing Division of the Packers and Stockyards Administration should make an examination of the records of these market agencies and report the facts developed to the arbitrators.

The arbitration plan of settling the questions at issue for St. Paul, Omaha, and Chicago was adopted in January 1923. The complainants and respondents at Omaha and St. Paul adopted the form of the Kansas City stipulation. A separate stipulation was entered into for Chicago, which reads as follows:

"It is hereby agreed between the complainants in the above entitled complaint and The Chicago Live Stock Ex-

change and all market agencies, members thereof, who are made defendants to said complaint, as follows:

"1. In lieu of the formal procedure and hearing provided for by the Packers and Stockyards Act, 1921, for the consideration and determination of the charges made in said complaint by the American National Live Stock Association and others against The Chicago Live Stock Exchange and others, the entire subject matter and charges in said complaint contained shall be investigated by G. N. Dagger, in charge of the Division of Rates and Charges of said Packers and Stockyards Administration, and Howard M. Gore, in charge of the Trade Practice Division of said Packers and Stockyards Administration, with full authority in said G. N. Dagger and Howard M. Gore, as arbitrators, to finally adjust and determine the issue raised by said complainants in their complaint against said Chicago Live Stock Exchange and the market agencies at the Chicago market.

"2. Upon the signing of this stipulation by the parties hereto, the schedule of rates and charges now on file with said Packers and Stockyards Administration shall remain in effect until the decision of said arbitrators is approved by the Secretary of Agriculture, and none of the parties hereto shall take any action in respect to the matters charged and referred to in said complaint pending the determination thereof by said arbitrators, for the purpose of concluding the proceedings instituted by the complainants.

"3. In performing their duties as such arbitrators, said G. N. Dagger and Howard M. Gore shall proceed in such manner and by such means as they deem necessary and proper and shall be extended by the complainants and these defendants all facilities and given all information as they may request and as in their judgment is necessary for the proper discharge of their duties as such arbitrators and to enable them to fairly determine what shall be regarded

as just and reasonable practices and schedules of rates and commission charges in the livestock commission business at the Chicago market.

"4. It is understood that the decision of such arbitrators upon the matters herein referred to shall be binding upon, and shall be accepted by all of the parties to the complaint, and that the rates and charges and practices found to be just and reasonable by said arbitrators and recommended by them shall be adopted by said Chicago Live Stock Exchange and the members thereof, upon approval by the Secretary of Agriculture, and shall be made effective to the same extent and as fully as if such decision and recommendations had been arrived at by the Secretary of Agriculture as the result of a formal hearing in accordance with the procedure provided by said Packers and Stockyards Act, 1921.

"5. The practices and rates and charges found to be just and reasonable by said arbitrators and recommended by them for adoption, if approved by the Secretary of Agriculture, shall be adopted by all of the market agencies at the Chicago market and enforced by the Packers and Stockyards Administration.

"6. No publicity shall be given to the information gathered by said arbitrators by either the complainants or the defendants herein, and no public statements or interviews with respect thereto given out, unless by authority or direction of said arbitrators.

"7. That this stipulation shall be executed in quadruplicate and one copy given to each of the following:

"(a) The Chief of the Packers and Stockyards Administration,

"(b) Messrs. G. N. Dagger and Howard M. Gore, the arbitrators.

"(c) The duly authorized representatives of the complainants.

"(d) The President of The Chicago Live Stock Exchange.

"8. The investigation by the arbitrators herein shall commence as soon as conveniently possible after the execution of this stipulation and shall be concluded within such reasonable time as the circumstances will permit.

"9. The recommendations, conclusions, and decisions of said arbitrators shall be reduced to writing and a copy thereof filed with the Packers and Stockyards Administration and a copy thereof delivered to the representative of the complainants and the President of The Chicago Live Stock Exchange. Such recommendations as to practices, rates, and schedules of commission charges and otherwise, as may be contained in said decision and report, when approved by the Secretary of Agriculture, shall be adopted by said Chicago Live Stock Exchange and the market agencies at the Chicago market and made effective as soon as conveniently possible after the receipt by the president of The Chicago Live Stock Exchange of said report of the arbitrators, or at such time as shall be directed by said arbitrators."

An informal public hearing was held in the Kansas City market during the week of October 30th, 1922. During the week of February 19th, 1923, an informal public hearing was had at St. Paul, Minn. The hearing at Chicago was held during the week beginning March 5th, 1923, which was resumed March 30th, 1923. The hearing at Omaha was held during the week beginning March 26th, 1923. These informal public hearings held by the arbitrators at the respective markets were widely announced and full opportunity was given to all interested parties to present information and suggestions bearing upon the reasonableness of the present commission charges. Market agencies, in-

dividual producers, and representatives of livestock organizations were present at all the hearings and submitted their views and recommendations to the arbitrators. Exhibits were submitted setting forth statistical data and other information bearing on the issue. A complete record was made of these proceedings. An invitation was extended to those present at the hearings and all others interested to present to the arbitrators any facts which in their judgment merited consideration at any time before the making of the final award.

The arbitrators found it necessary to make extensive investigations and study on their own account in order to secure needed information. The Auditing Division of the Packers and Stockyards Administration made such audit of the books of all the market agencies at the four markets involved as the time at hand would permit and furnished information relative to the profits and losses for each firm for a period of time sufficient to indicate the state of the business. The Auditing Division also secured and furnished information in regard to the character of the receipts of the different classes of livestock at each of the markets. The plan followed in collecting information of this character was to select representative months to show the number of head per car, drafts per car, buyers per car, gross sales, weight per car, commission per car, and other expenses, and such other information as would be useful. Numerous conferences were held with officials of livestock exchanges, officials of livestock organizations, and other informed persons. A questionnaire was sent to each market agency which was designed to secure information bearing upon the volume of business handled during the year 1922, the number of employees engaged by each firm, the salary paid each, and such other information as would clearly disclose the nature of their organizations and their business operations.

In order to thoroughly familiarize themselves with local conditions prevailing at the several markets in question,

the arbitrators made extensive personal investigations, spending considerable time in observing market transactions in the yards.

Various reports and letters bearing information and suggestions were received from individuals interested in commission rates. The information submitted by the interested parties, as well as information secured in other ways, has been carefully reviewed. All the documents, letters, and other papers submitted, including the record of the hearings, are on file with the Packers and Stockyards Administration.

In approaching their duties the arbitrators have been cognizant of the situation of the livestock producer and the economic conditions which have confronted him during the past three years. They have also recognized that the welfare of the livestock industry is of mutual interest to the producer, the consumer, and intermediate agencies, and that it is desirable, therefore, to maintain marketing costs on as low a basis as is consistent with efficient service.

It is a noteworthy fact that the manner in which livestock is shipped to market has materially changed during the past few years. Also the methods of purchasing livestock have undergone material changes. Market agencies are confronted with the necessity of meeting the changing conditions without lowering the efficiency of their service. It has been the usual custom on the part of the producer or shipper to ship his animals in carload lots, with seldom more than one owner, but with the development of cooperative shipping a very large percent of the shipments of livestock at the four markets under consideration is owned by two or more persons, frequently the owners numbering as high as fifteen and twenty to the car. This method of shipping necessitates a marked departure from the usual method of selling and accounting for livestock to the producers and shippers.

In the purchase of livestock in the market the buyers representing the larger packers are usually in close touch

with their chief buyer, who is generally located in Chicago. He keeps in close touch with the buyers of his concern in the various markets and apparently directs in considerable detail the purchases of the various representatives on the several markets. It appears that the larger purchasing concerns have adopted the policy of employing representatives who specialize in the purchase of market grades and classes. The average buyer to-day representing a packer, either at the market place or elsewhere, is usually looking for animals to fill a definite place in the course of business of that concern. In order to determine properly market value, broadly speaking, the buying conditions found at the several markets require that market agencies be informed as to the receipts of livestock at the various important markets, the prospective supply of livestock, the condition of the fresh and cured meat trade, the volume of various packing house products going into consumptive channels, the needs of the local packing plants, demand of buyers from other centers, and be in possession of information concerning the many other factors that enter into the establishing of the trading basis of a given market from time to time. A selling agency at a market center, in addition to being posted on general trade conditions, must be a judge of both the quality of the various classes of livestock and their market value at the time of sale.

It is conceded by all parties that the improper loading at the time of shipment and improper handling of animals in transit, neglect in proper caring for and feeding the animals upon arrival at the market, lack of information or selling ability on the part of the market agencies, neglect in safeguarding other interests of the shipper, may reflect themselves materially in the net return to the shipper or producer.

In reaching a conclusion as to what, in their judgment, will be a fair charge for the producer to pay and a fair compensation to the market agencies for the services rendered, the arbitrators have in mind that it is not within

their province to pass on the question of whether a firm has a right to act as a market agency, but they have approached it from the standpoint that the compensation should be reasonably remunerative to those efficiently functioning as market agencies. It would not be to the advantage of the livestock producer to bring about arbitrarily such conditions as to cause necessary talent to seek a field for its services other than with a livestock market agency. It appears that the producer and the shipper should be the best judges as to the quality of service furnished them by the several market agencies and as to whether the service is satisfactory. It is entirely within the power of the patrons of the market to withhold patronage from those market agencies that fail to give satisfactory service. Herein lies an effective means, available to the shipper, of improving market services.

At the four markets involved the shipper may avail himself of the services of the "old line" commission firms or cooperative commission agencies. In addition, if the shipper or producer desires to offer his livestock for sale in person, the facilities of the market center for receiving, caring for, and making delivery of his livestock are available to him. This condition offers the producer a choice of methods of selling his livestock and the compensation that he shall pay therefor. The Bureau of Agricultural Economics is constantly represented at the market centers and prepares and disseminates, from day to day, carefully analyzed reports of the market conditions on classes and grades of all species of livestock. A similar service is performed by daily market papers and other marketing organization. From these agencies producers and shippers can inform themselves as to the market conditions under which livestock is being handled.

In approaching the determination of the reasonableness of commission rates for handling livestock at the stockyards, it is apparent, both from information and observation, that while the judicious employment of limited capital

is necessary, yet capital as such is not a material income-producing factor. The commission business is essentially personal in the character of the service performed. The relation between the market agency and its customers is primarily a personal one. The useful market agency must always be alert in observing and sensing those factors which enter into the making of market prices from day to day and hour to hour. Constant attention to the maintenance of the highest kind of personal service in behalf of shippers must be exercised at all times. The sound business judgment and integrity of the market agency is of prime importance to the producer and shipper. The selling of the producer's livestock to persons with the ability to pay, collecting, safeguarding, and remitting the proceeds to the shipper, are important factors that enter into an adequate service. With these facts in mind, the arbitrators believe the livestock industry will be benefited by the maintenance of the highest quality of service at the market centers.

The arbitrators have considered the commission business strictly on its merits and apart from other activities engaged in by commission firms. In taking this view, it is not their thought that those associated enterprises are not proper activities for those engaged in the commission business, or that they are not beneficial to very many producers, but it is their conclusion that the matter of rates should be considered strictly from the viewpoint of the commission business as such. Very many services beneficial to the producers are, and even to an enlarged degree can be, performed by the market agencies in addition to the strict duties of selling and accounting for livestock.

In respect to market and financial risks to which market agencies are exposed, insurance against many of these losses has been devised and is offered to market agencies at a comparatively nominal fee. The market agency bears many risks against which there is no insurance or protection, and at the same time is financially responsible to the

shipper. Moreover, it is apparent that market agencies must meet the general economic conditions that prevail in respect to wages, cost of equipment, and such other elements as are essential in the conduct of their business.

It is the opinion of the arbitrators that market agencies which conduct a reasonably efficient business should not be arbitrarily denied a reasonable margin of profit for the capital, responsibilities, and risks involved. The conclusions reached are based upon what appears to be the basis upon which a well organized commission firm with a reasonable volume of business can operate efficiently, maintaining a high character of service and giving opportunity for reasonable profit.

Many suggestions have been received proposing changes in the methods of assessing and collecting commission charges, but the present form in which shipments are received at the markets renders it inadvisable to make any radical departures. In the present schedules of commission charges there are features which the arbitrators deem advisable to change, believing that their present operation is not entirely equitable. No departure has been made except after full and careful deliberation. The arbitrators are aware that should any of the proposed changes prove to be impracticable, relief may be had upon a proper showing to the Secretary.

The arbitrators are cognizant of the fact that it is difficult to arrive at an exact figure where so many complex services are required. However, after considering all the factors and problems involved, the arbitrators conclude that the schedule of rates and charges hereinafter set forth for the markets under consideration will reasonably compensate market agencies engaged in the sale of livestock on a commission basis for the services performed and the producer and shipper of livestock will not pay more than a reasonable charge for the services required. It is therefore recommended for the approval of the Secretary that the schedules of rates and charges now in effect at the markets concerned be amended to comply with the following

provisions and put into full force and effect as promptly as circumstances will permit.

CHICAGO SELLING COMMISSIONS—SINGLE OWNERSHIP—CARLOAD LOTS

Cattle

20 head or less, $17.00—and 75¢ per head for each additional head over 20 head, with a maximum of $21.00.

When car contains less than 14 head, the "drive-in" schedule applies.

Calves—Single-deck

50 head or less, $17.00—and 30¢ per head for each additional head over 50 head, with a maximum of $22.00.

Double-deck

70 head or less, $23.00—and 30¢ per head for each additional head over 70 head, with a maximum of $28.00.

When car contains less than 40 head, the "drive-in" schedule applies.

Hogs—Single-deck

50 head or less, $13.00—and 15¢ per head for each additional head over 50 head, with a maximum of $15.00. An additional charge of 30¢ shall be made for each full 500 pounds weight over 17,000 pounds.

Double-deck

80 head or less, $18.00—and 15¢ per head for each additional head over 80 head, with a maximum of $23.00. An additional charge of 30¢ shall be made for each full 500 pounds weight over 27,000 pounds. When a car contains less than 40 head, the "drive-in" schedule applies.

Sheep—Single-deck, $14.00
Double-deck, $20.00

When a car contains less than 50 head, the "drive-in" schedule applies.

Mixed Livestock

	Per head	Single-deck maximum	Double-deck minimum
Cattle	85¢	$21.00	.....
Calves	35¢	22.00	$28.00
Hogs	25¢	15.00	23.00
Sheep	20¢	14.00	20.00

Minimum of $16.00, and maximum of $26.00, on single-deck car.

Minimum of $21.00, and maximum of $29.00, on double-deck car.

When a car contains cattle and calves only, the minimum shall be $17.00 and the maximum $24.00.

SELLING COMMISSION—PLURAL OWNERSHIP—CARLOAD LOTS

Plural Owner Car Lots—Sold as Single Ownership

When plural ownership carload lots of livestock are handled in the same manner as single ownership cars—that is, not weighed for ownership, marks, brands, or other identification and not prorated, but handled for market grades and classes only—the single ownership schedules shall apply.

Plural Owner Car Lots Handled for Ownership Marks, Brands, or Other Identification.

When carloads of livestock require prorating, separate sorting, selling, or weighing for ownership, marks, brands, or other identification, or at request of shipper, the following rates shall apply.

Unmixed Cars

	Per head	Single-deck Minimum	Single-deck Maximum	Double-deck Minimum	Double-deck Maximum
.....	85¢	$18.00	$22.00	.....	.....
.....	35¢	18.00	23.00	$24.00	$29.00
.....	25¢	14.00	16.00	19.00	24.00
.....	20¢	14.00	16.00	20.00	22.00

Mixed Cars

	Per head	Single-deck maximum	Double-deck maximum
Cattle	85¢	$22.00	.....
Calves	35¢	23.00	$29.00
Hogs	25¢	16.00	24.00
Sheep	20¢	16.00	22.00

Minimum of $17.00, and maximum of $26.00, on single-deck car.

Minimum of $22.00, and maximum of $29.00, on double-deck car.

When a car contains cattle and calves only, the minimum shall be $18.00 and the maximum $24.00.

Under this schedule no owner shall pay more than the maximum commission and extra service charges, if any, on single ownership carloads.

Stock driven or hauled in

The rates of the present Chicago "drive-in" schedule will apply.

EXTRA SERVICES

Drafts

1. Single Ownership.—When requested or necessary to grade or sort car lots of livestock or single ownership into market grades and classes a charge of 15¢ shall be made for each draft over three drafts per deck—each draft to be represented by a separate scale ticket. Maximum charge, $2.00.

2. Plural Ownership.—When requested or necessary to grade or sort car lots of livestock of plural ownership for ownership, market grades and classes, brands, marks, or other identification, a charge of 15¢ per draft shall be made for each draft over three per deck—each draft to be represented by a separate scale ticket. Maximum charge, $3.00.

Prorating

When prorating is done a charge of 25¢ for each owner shall be made, with a minimum charge of $1.00 and a maximum charge of $2.50 for this service.

Individual account sales

When individual statements are requested in addition to the master prorate sheet a charge of 5¢ extra shall be made for each statement.

KANSAS CITY—SELLING COMMISSIONS—SINGLE OWNERSHIP—CARLOAD LOTS

Cattle

20 head or less, $15.00—and 65¢ per head for each additional head over 20 head, with a maximum of $19.00.

When car contains less than 14 head the "drive-in" schedule applies.

Calves—Single-deck

50 head or less, $15.00—and 30¢ per head for each additional head over 50 head, with a maximum of $20.00.

Double-deck

70 head or less, $21.00—and 30¢ per head for each additional head over 70 head, with a maximum of $26.00.

When car contains less than 40 head the "drive-in" schedule applies.

Hogs—Single-deck

50 head or less, $12.00—and 15¢ per head for each additional head over 50 head, with a maximum of $14.00. An additional charge of 30¢ shall be made for each full 500 pounds weight over 17,000 pounds.

Double-deck

80 head or less, $17.00—and 15¢ per head for each additional head over 80 head, with a maximum of $22.00.

An additional charge of 30¢ shall be made for each full 500 pounds weight over 27,000 pounds.

When a car contains less than 40 head the "drive-in" schedule applies.

Sheep—Single-deck $14.00
Double-deck $20.00

When a car contains less than 50 head, the "drive-in" schedule applies.

Mixed Livestock

	Per head	Single-deck maximum	Double-deck maximum
Cattle	75¢	$19.00	.....
Calves	35¢	20.00	$26.00
Hogs	25¢	14.00	22.00
Sheep	20¢	14.00	20.00

Minimum of $15.00 and maximum of $25.00, on single-deck car.

Minimum of $20.00 and maximum of $28.00, on double-deck car.

When a car contains cattle and calves only, the minimum shall be $15.00 and the maximum $22.00.

SELLING COMMISSION—PLURAL OWNERSHIP—CARLOAD LOTS

Plural Owner Car Lots—Sold as Single Ownership

When plural ownership carload lots of livestock are handled in the same manner as single ownership cars—that is, not weighed for ownership, marks, brands, or other identification, and not prorated, but handled for market grades and classes only—the single ownership schedules shall apply.

Plural Owner Car Lots Handled for Ownership, Marks, Brands, or Other Identification

When carloads of livestock require prorating, separate sorting, selling, or weighing for ownership, marks, brands, or other identification, or at request of shipper, the following rates shall apply:

Unmixed Cars

	Per head	Single-deck Minimum	Single-deck Maximum	Double-deck Minimum	Double-deck Maximum
Cattle	75¢	$16.00	$20.00	.....	.....
Calves	35¢	16.00	21.00	$22.00	$27.00
Hogs	25¢	13.00	15.00	18.00	23.00
Sheep	20¢	14.00	16.00	20.00	22.00

Mixed Cars

	Per head	Single-deck maximum	Double-deck maximum
Cattle	75¢	$20.00	.....
Calves	35¢	21.00	$27.00
Hogs	25¢	15.00	23.00
Sheep	20¢	16.00	22.00

Minimum of $16.00 and maximum of $25.00, on single-deck car.

Minimum of $21.00 and maximum of $28.00, on double-deck car.

When a car contains cattle and calves only, the minimum shall be $16.00 and the maximum $22.00.

Under this schedule no owner shall pay more than the maximum commission and extra service charges, if any, on single ownership carloads.

Stock Driven or Hauled In

The rates of the present Kansas City "drive-in" schedule shall apply.

EXTRA SERVICES

Drafts

1. Single Ownership.—When requested or necessary to grade or sort car lots of livestock of single ownership into market grades and classes, a charge of 15¢ shall be made for each draft over three drafts per deck—each draft to be represented by a separate scale ticket. Maximum charge, $2.00.

2. Plural Ownership.—When requested or necessary to grade or sort car lots of livestock of plural ownership for ownership, market grades and classes, brands, marks, or other identification, a charge of 15¢ per draft shall be made for each draft over three per deck—each draft to be represented by a separate scale ticket. Maximum charge, $3.00.

Prorating

When prorating is done a charge of 25¢ for each owner shall be made, with a minimum charge of $1.00 and a maximum charge of $2.50 for this service.

Individual Account Sales

When individual statements are requested in addition to the master prorate sheet, a charge of 5¢ extra shall be made for each statement.

OMAHA—SELLING COMMISSIONS—SINGLE OWNERSHIP—CARLOAD LOTS

Cattle

20 head or less, $15.00—and 70¢ per head for each additional head over 20 head, with a maximum of $19.00.

When car contains less than 14 head, the "drive-in" schedule applies.

Calves—Single-deck

50 head or less, $15.00—and 30¢ per head for each additional head over 50 head, with a maximum of $20.00.

Double-deck

70 head or less, $21.00—and 30¢ per head for each additional head over 70 head, with a maximum of $26.00.

When car contains less than 40 head, the "drive-in" schedule applies.

Hogs—Single-deck

50 head or less, $12.00—and 15¢ per head for each additional head over 50 head, with a maximum of $14.00. An additional charge of 30¢ shall be made for each full 500 pounds weight over 17,000 pounds.

Double-deck

80 head or less, $17.00—and 15¢ per head for each additional head over 80 head, with a maximum of $22.00. An additional charge of 30¢ shall be made for each full 500 pounds weight over 27,000 pounds.

When a car contains less than 40 head, the "drive-in" schedule applies.

Sheep—Single-deck $14.00
Double-deck $20.00

When a car contains less than 40 head, the "drive-in" schedule applies.

Mixed Livestock

	Per head	Single-deck maximum	Dpuble-deck maximum
Cattle	75¢	$19.00	.....
Calves	35¢	20.00	$26.00
Hogs	25¢	14.00	22.00
Sheep	20¢	14.00	20.00

Minimum of $15.00, and maximum of $25.00, on single-deck car.

Minimum of $20.00, and maximum of $28.00, on double-deck car.

When a car contains cattle and calves only, the minimum shall be $15.00, and the maximum $22.00.

SELLING COMMISSION—PLURAL OWNERSHIP—CARLOAD LOTS

Plural Owner Car Lots—Sold as Single Ownership

When plural ownership carload lots of livestock are handled in the same manner as single ownership cars—that is, not weighed for ownership, marks, brands, or other identification and not prorated, but handled for market grades and classes only—the single ownership schedules shall apply.

Plural Owner Car Lots Handled for Ownership, Marks, Brands, or Other Identification

When carloads of livestock require prorating, separate sorting, selling, or weighing for ownership, marks, brands, or other identification, or at request of shippers, the following rates shall apply.

Unmixed Cars

	Per head	Single-deck Minimum	Single-deck Maximum	Double-deck Minimum	Double-deck Maximum
Cattle	75¢	$16.00	$20.00	.....	.....
Calves	35¢	16.00	21.00	$22.00	$27.00
Hogs	25¢	13.00	15.00	18.00	23.00
Sheep	20¢	14.00	16.00	20.00	22.00

Mixed Cars

	Per head	Single-deck maximum	Double-deck maximum
Cattle	75¢	$20.00	.....
Calves	35¢	21.00	$27.00
Hogs	25¢	15.00	23.00
Sheep	20¢	16.00	22.00

Minimum of $16.00 and maximum of $25.00, on single-deck car.

Minimum of $21.00, and maximum of $28.00, on double-deck car.

When a car contains cattle and calves only, the minimum shall be $16.00 and the maximum $22.00.

Under this schedule no owner shall pay more than the maximum commission and extra service charges, if any, on single ownership carloads.

Stock Driven or Hauled In

The rates of the present Omaha "drive-in" schedule shall apply.

EXTRA SERVICES

Drafts

1. Single Ownership.—When requested or necessary to grade or sort car lots of livestock of single ownership into market grades and classes, a charge of 15¢ shall be made for each draft over three drafts per deck—each draft to be represented by a separate scale ticket. Maximum charge, $2.00.

2. Plural Ownership.—When requested or necessary to grade or sort car lots of livestock of plural ownership for ownership, market grades and classes, brands, marks, or other identification, a charge of 15¢ per draft shall be made for each draft over three per deck—each draft to be represented by a separate scale ticket. Maximum charge, $3.00.

Prorating

When prorating is done a charge of 25¢ for each owner shall be made with a minimum charge of $1.00 and a maximum charge of $2.50 for this service.

Individual account sales

When individual statements are requested in addition to the master prorate sheet, a charge of 5¢ extra shall be made for each statement.

ST. PAUL—SELLING COMMISSIONS—SINGLE OWNERSHIP—CARLOAD LOTS

Cattle

20 head or less, $15.00—and 65¢ per head for each additional head over 20 head, with a maximum of $19.00.

When car contains less than 14 head, the "drive-in" schedule applies.

Calves—Single-deck

50 head or less, $15.00—and 30¢ per head for each additional head over 50 head, with a maximum of $20.00.

Double-deck

70 head or less, $21.00—and 30¢ per head for each additional head over 70 head, with a maximum of $26.00.

When car contains less than 40 head, the "drive-in" schedule applies.

Hogs—Single-deck

50 head or less, $12.00—and 15¢ per head for each additional head over 50 head, with a maximum of $14.00. An additional charge of 30¢ will be made for each full 500 pound weight over 17,000 pounds.

Double-deck

80 head or less, $17.00—and 15¢ per head for each additional head over 80 head, with a maximum of $22.00. An additional charge of 30¢ will be made for each full 500 pounds weight over 27,000 pounds.

When car contains less than 40 head, the "drive-in" schedule applies.

Sheep—Single-deck $14.00

Double-deck $20.00

When a car contains less than 50 head, the "drive-in" schedule applies.

Mixed Livestock

	Per head	Single-deck maximum	Double-deck maximum
Cattle	75¢	$19.00	.....
Calves	35¢	20.00	$26.00
Hogs	25¢	14.00	22.00
Sheep	20¢	14.00	20.00

Minimum of $15.00, and maximum of $25.00, on single-deck car.

Minimum of $20.00, and maximum of $28.00, on double-deck car.

When a car contains cattle and calves only, the minimum shall be $15.00 and the maximum $22.00.

SELLING COMMISSION—PLURAL OWNERSHIP—CARLOAD LOTS

Plural owner car lots—Sold as single ownership

When plural ownership carload lots of livestock are handled in the same manner as single ownership cars—that is, not weighed for ownership, marks, brands, or other identification and not prorated, but handled for market grades and classes only—the single ownership schedules shall apply.

Plural owner car lots handled for ownership, marks, brands, or other identification

When carloads of livestock require prorating, separate sorting, selling, or weighing for ownership, marks, brands, or other identification, or at request of shipper, the following rates shall apply:

Unmixed Cars

	Per head	Single-deck Minimum	Single-deck Maximum	Double-deck Minimum	Double-deck Maximum
Cattle	75¢	$16.00	$20.00	.....	.....
Calves	35¢	16.00	21.00	$22.00	$27.00
Hogs	25¢	13.00	15.00	18.00	23.00
Sheep	20¢	14.00	16.00	20.00	22.00

Mixed Cars

	Per head	Single-deck maximum	Double-deck maximum
Cattle	75¢	$20.00	.....
Calves	35¢	21.00	$27.00
Hogs	25¢	15.00	23.00
Sheep	20¢	16.00	22.00

Minimum of $16.00 and maximum of $25.00, on single-deck car.

Minimum of $21.00 and maximum of $28.00, on double-deck car.

When a car contains cattle and calves only the minimum shall be $16.00 and the maximum $22.00.

Under this schedule no owner shall pay more than the maximum commission and extra service charges, if any, on single ownership carloads.

Stock Driven or Hauled In

For St. Paul, the "drive-in" schedule shall be: cattle, 80¢ per head; calves, 40¢ per head; hogs, 30¢ per head; and sheep and goats, 20¢ per head.

EXTRA SERVICES

Drafts

1. Single Ownership.—When requested or necessary to grade or sort car lots of livestock of single ownership into market grades and classes, a charge of 15¢ shall be made for each draft over three drafts per deck—each draft to be represented by a separate scale ticket. Maximum charge, $2.00.

2. Plural Ownership.—When requested or necessary to grade or sort car lots of livestock of plural ownership for ownership, market grades and classes, brands, marks, or other identification, a charge of 15¢ per draft shall be made for each draft over three per deck—each draft to be represented by a separate scale ticket. Maximum charge, $3.00.

Prorating

When prorating is done a charge of 25¢ for each owner shall be made, with a minimum charge of $1.00 and a maximum charge of $2.50 for this service.

Individual Account Sales

When individual statements are requested in addition to the master prorate sheet, a charge of 5¢ extra shall be made for each statement.

If circumstances arise under which more than one interpretation of the schedules might be applied, that interpretation which is most favorable to the shipper shall be used.

The revised schedules contemplate a basic charge for those shipments requiring a uniform service and additional charges for those shipments requiring services in addition to the usual standard service. The draft charge is designed to operate when more than the ordinary amount of sorting, grading, and weighing for ownership and market grades and classes is necessary. The prorating charge is to compensate for a complete accounting of each owner's livestock in a plural ownership shipment. If, in addition, a separate statement for each owner is rendered, then an additional charge is provided for this service. The amount that can be collected for these special services has been carefully limited and the charges can be assessed only to the extent that the services are utilized. This makes it possible for all shippers to get the benefit of the basic charge when the character of their shipments does not require this extra service. The shippers are thus relieved from paying for

services not necessary to the proper marketing of their shipments.

It is the recommendation of the arbitrators that the schedules revised in accordance with the above provisions should be observed by all market agencies engaged in business at each of the markets involved and that no departure from the established schedule should be made except after an actual demonstration by a market agency that it can successfully and efficiently operate under a different schedule than the one herein proposed. A showing for such departure should be based on the facts concerning the operations of the concern which seeks to change its schedule.

The arbitrators are duly appreciative of the confidence reposed in them, and if substantial justice results from their efforts they will be gratified at this opportunity to have served the industry.

In carrying out their duties the arbitrators have found it necessary to avail themselves of the assistance of many of those engaged in the various phases of producing and marketing livestock. This assistance has been freely and cordially given by the market agencies and their staffs, the producers and their representatives, the staff of the Packers and Stockyards Administration, and by many others engaged in the industry. For the cooperation and assistance given, the arbitrators desire to express their appreciation and to accord a full measure of credit.

(Signed) G. N. DAGGER.

(Signed) HOWARD M. GORE.

Date of Award July 24th, 1923.

Approved by Authority of Secretary Henry C. Wallace.

(Signed) C. W. PUGSLEY,
Acting Secretary,
United States Department of Agriculture.

JULY 27, 1923.

APPENDIX C

Extracts from oral argument of J. S. Bohannan at the office of the Assistant Secretary of Agriculture, March 24, 1933 (Pet. Ex. 9x, see R. 371)

"One of the issues revolves around that matter of the allowance for salesmanship. The Respondents in this case do not agree with our method, and they appointed a Board of Appraisers either living in Kansas City or in territory from which that market draws its business, and they had these appraisers appraise the value of each one of these firm members. Now, we think that is faulty in several respects. One of them is that it puts the matter on a personal basis. For instance, one of these, a member of one firm, is Mr. Swift of Swift & Henry. His value was appraised very high because Mr. Swift is a very fine man and the appraisers so thought, and the record will show that at least some of the appraisers testified that if Mr. Swift should die, why, then, the value of the successor might be entirely different; in other words, they appraised an individual and not a service rendered. We think the service rendered should be appraised. In other words, our idea is this: that a $10,000 a year lawyer may go out to dig ditches, and when he is digging ditches, he is only entitled to the remuneration of a ditch-digger, and so we think that it is the service rendered and what you can get that service rendered satisfactorily for. Now, it is perfectly obvious that the employed salesmen, like the salesmen of the great firm of John Clay and Company,—it has branches at many stockyards and taken altogether is the largest commission firm in the United States, they operate with employed salesmen and their salesmen are highly efficient and render as good service as anybody's salesmen, so we think that what you can hire the service for is what

the service is worth, no matter who renders it. The Respondents do not agree with us.

* * * * * * *

I think I can say to you that I do not believe that any of these members of these commission firms are receiving too much money. In fact, I don't know that we would have any power to say that an individual is receiving too much money if he is rendering service at a reasonable cost. If he can multiply that service enough times, of course, he could make a great deal of money and still his charges be reasonable. But the reason that Mr. Olander and other men, the primary reason why they are not making possibly as much money as they are entitled to, is because there are too many of them. Now, that is the situation that cannot be taken care of in the rate without imposing upon the rate payers the necessity of supporting a surplus of people, and a rate that supports a surplus is, we think, an unreasonable rate."

APPENDIX D

Form PS-3

ANNUAL REPORT

of

.....

(Name of commission agency)

.....

(Address)

FOR THE YEAR ENDED DECEMBER 31, 1937

If operations reported herein cover other than the calendar year 19 indicate the period included.

.....

This report should be filled out by MARKET AGENCIES (excep regular order buyers) engaged in the business of buying or selling livestoc at a public stockyard on a commission basis and returned

NOT LATER THAN MARCH 15, 1938

to the

BUREAU OF ANIMAL INDUSTRY

UNITED STATES DEPARTMENT OF AGRICULTURE

WASHINGTON, D. C.

8-2628

GENERAL INFORMATION

1. Give date of organization:

2. If any change in organization took place during the year, give full details:

3. State whether a corporation, partnership, individual, or association

4. If a corporation or association, give the data called for below:
   (*a*) Incorporated under laws of what State
   (*b*) Amount of authorized capital
   (*c*) Number of shares issued and outstanding
   (*d*) Par value, $
   (*e*) List of principal stockholders at end of year:

NAME	ADDRESS	NUMBER OF SHARES OWNED

5. If a partnership or individual, furnish the data called for in the following table as at the close of the year:

NAME OF OWNER OR PARTNERS	CAPITAL INVESTMENT	BASIS FOR DIVISION OF EARNINGS
	$	

6. Give names and addresses of dealers or other market agencies, if any, whose business was cleared during the year (if space provided is not sufficient, additional sheets containing the information should be attached hereto):

NAME	ADDRESS

7. If the business of reporting agency was cleared during the year, insert the name of clearing agency:

8. State the number of memberships, if any, in local livestock exchange
   Indicate whether owned or held by the reporting agency or by individual members or employees:

8—9408

9. If reporting agency is engaged in feeding or other outside operations, state the nature and of same:

10. State the total GROSS VALUE of all livestock sold on commission..... $
State the total GROSS VALUE of all livestock bought on order.....

TOTAL GROSS VALUE..... $

NOTE.—Report value of trading transactions, if any, on page 3.

11. In case you have given a bond to a stockyard company covering payment of freight, fe yardage, the total amount of such items is deductible from your gross sales and/or pu in determining the amount of the bond required under the Packers and Stockyards Act. fore, the following additional information should be furnished: Do you have a bond g teeing the payment of freight, feed, and yardage to a stockyard company? *If s is the amount of the bond? $ How much did you pay to a stockyard compan ing period covered by this report for the following: Freight, $ Feed, $ Yardage, $

*NOTE.—In the event you do not have such a bond, the questions relating to it need not be answered.

STATEMENT OF VOLUME OF BUSINESS DURING PERIOD

NOTE.—Where one agency clears the business of another agency, the number of cars and head of the cleared should NOT be included in this report.

STRAIGHT CARS—BY RAIL

SPECIES	SOLD ON CONSIGNMENT			BOUGHT ON ORDER		
	NUMBER OF CARS		NUMBER OF HEAD, ALL CARS	NUMBER OF CARS		NUM H ALL
	Single deck	Double deck		Single deck	Double deck	
Cattle and calves						
Hogs						
Sheep and goats						
Horses and mules						
TOTAL						

MIXED CARS—BY RAIL

	NUMBER OF CARS		NUMBER OF HEAD			
	SINGLE DECK	DOUBLE DECK	CATTLE	CALVES	HOGS	SHE GO
Sold on consignment						
Bought on order						

OTHER THAN BY RAIL

SPECIES	NUMBER OF HEAD, DRIVEN IN OR TRUCKED IN, SOLD ON CONSIGNMENT	NUMBER OF HEAD, DRIVEN OUT OR TRUCKED OUT, BOUGHT ON ORDER	NUMBER OF HEAD, Y OR DEALERS' SALE
Cattle			
Calves			
Hogs			
Sheep and goats			
Horses and mules			
TOTAL			

THIS PAGE TO BE USED BY COMMISSION AGENCIES FOR REPORTING TRADING TRANSACTIONS

Cattle and calves:	Number of Head	Weight	Amount
(a) Sales			$
(b) Beginning inventory			
(c) Purchases			
(d) Total (b and c)			$
(e) Closing inventory			
(f) Cost of sales (d less e)			
(g) Gross Profit or Loss (a less f) carried to Profit and Loss Statement			$

Hogs:	Number of Head	Weight	Dockage	Amount
(a) Sales				$
(b) Beginning inventory				
(c) Purchases				
(d) Total (b and c)				$
(e) Closing inventory				
(f) Cost of sales (d less e)				
(g) Gross Profit or Loss (a less f) carried to Profit and Loss Statement				$

Sheep and goats (or horses and mules):	Number of Head	Weight	Amount
(a) Sales			$
(b) Beginning inventory			
(c) Purchases			
(d) Total (b and c)			$
(e) Closing inventory			
(f) Cost of sales (d less e)			
(g) Gross Profit or Loss (a less f) carried to Profit and Loss Statement			$

SCHEDULE OF SALARIES AND WAGES PAID DURING THE PERI COVERED BY THIS REPORT

OWNERS' SALARIES

NAME	OFFICIAL TITLE OR NATURE OF DUTIES	LENGTH OF TIME EMPLOYED DURING YEAR	TOTAL COMPENSATI
			$
TOTAL (carried to Profit and Loss Statement, page 6)			$

EMPLOYEES' SALARIES

			$
TOTAL (carried to Profit and Loss Statement, page 6)			$

If additional space is required, use separate sheet and attach to this report. Amounts pai temporary or extra employees engaged for short periods may be consolidated in one item.

ALANCE SHEET AT END OF PERIOD COVERED BY THIS REPORT

ASSETS

RRENT:		
Cash on hand		$
Cash in bank—General account		
Cash in bank—Shippers' proceeds account		
Proceeds receivable	$	
Accounts receivable—Trade		
Accounts receivable—Other		
Notes receivable		
TOTAL RECEIVABLES	$	
Less reserve for bad debts		
Inventory of livestock		
VESTMENTS		
ED ASSETS:		
Office and operating equipment	$	
Less reserve for depreciation		
Exchange memberships		
Other fixed assets		
SCELLANEOUS ASSETS:		
Prepaid and deferred items		
Branch account		
Good will		
Other assets		
TOTAL ASSETS		$

LIABILITIES AND NET WORTH

RRENT LIABILITIES:		
Bank overdraft		$
Proceeds payable		
Accounts payable—Yard Co.		
Accounts payable—Other		
Notes payable*		
SCELLANEOUS ACCOUNTS:		
Reserve accounts		
Branch account		
Other liabilities		
T WORTH—If a corporation:		
Capital stock	$	
Surplus or deficit		
TOTAL NET WORTH (same as line 12, page 7)		
T WORTH—If unincorporated:		
Owners' capital investment	$	
Undivided profit or loss		
TOTAL NET WORTH (same as line 12, page 7)		
TOTAL LIABILITIES AND NET WORTH		$

*State amount of notes receivable discounted, $

8—2606

PROFIT AND LOSS STATEMENT

INCOME		
COMMISSIONS:		
Selling	$	
Buying		
Clearance*		
Yard sales		
Other		$
OTHER INCOME:		
Interest earned	$	
Trading profit (or loss in red)		
Other earnings		
TOTAL INCOME		$
EXPENSES		
SALARIES AND WAGES:		
Owners' salaries (detail on page 4)	$	
Employees' salaries (detail on page 4)		
Bonuses and other labor		
OTHER OPERATING EXPENSES:		
Advertising		
Commissions paid—clearance and split		
Depreciation		
Exchange assessments and dues		
Office supplies, printing, etc.		
Rent, heat, and light		
Telephone and telegraph		
Travel and entertainment		
Unclassified and all other		
NONOPERATING EXPENSES:		
Interest paid		
Federal income taxes		
Miscellaneous		
TOTAL EXPENSES		
NET PROFIT (carried to line 2, page 7)		
NET LOSS (carried to line 7, page 7)		$

*Show commission received for clearing business of other market agencies.

RECONCILIATION OF NET WORTH

(1) NET WORTH—Beginning of period		$
ADDITIONS:		
(2) Net profit (from profit and loss, page 6)	$	
(3) Additional capital investments		
(4) Other additions (classify)—		
(5) TOTAL ADDITIONS		$
(6) TOTAL NET WORTH AND ADDITIONS		
DEDUCTIONS:		
(7) Net loss (from profit and loss, page 6)		
(8) Cash dividends paid		
(9) Individual or partners' withdrawals		
(10) Other deductions (classify)—		
(11) TOTAL DEDUCTIONS		
(12) NET WORTH—End of period		$

(1) This item will be the amount of net worth shown in previous report.
(4) and (10) Support items, with detailed information to show nature of same.
(9) Include only withdrawals by owner or partners not considered in the nature of compensation for services. Amounts paid to owner or partners, either in the form of salary or division of profits as compensation for services, should be included on page 4 under "owners."
(12) This item will be the same as reported in the balance sheet as "Total Net Worth."

VERIFICATION

This report is subject to verification by the Bureau, and you should be prepared to give details of any items shown should occasion arise. Any additional remarks or information tending to explain or amplify the figures given in this report may, if desired, be submitted below or on an attached sheet.

CERTIFICATE

The undersigned hereby certifies that this report has been prepared by him or under his direction, from the books and records, and that to the best of his knowledge and belief said report correctly reflects the operations of the reporting agency.

By

(Indicate capacity of individual signing)

U. S. GOVERNMENT PRINTING OFFICE 8—8408

APPENDIX E

Order promulgating rules of practice to govern proceedings under the Packers and Stockyards Act, 1921, as amended*

Pursuant to authority conferred upon me by law (5 U. S. C. sec. 22 and 7 U. S. C. sec. 228) I, H. A. Wallace, Secretary of Agriculture, do hereby promulgate the following rules of practice to govern proceedings arising under the Packers and Stockyards Act, 1921, as amended:

1. Any complaint issued under section 203 (a), and any notice of inquiry issued under section 306 (e), 309 (b), 309 (c), 311, or 401, and any petition filed pursuant to section 309 (a), and any order to show cause why an application for license should not be denied or why a license should not be suspended or revoked, issued under section 502 (b) or section 505, shall state, briefly and clearly, the facts complained of, in the case of a complaint or petition, or the matters concerning which the notice of inquiry or order to show cause is issued. A person against whom a complaint, or to whom a notice of inquiry or order to show cause, is issued shall be designated as the respondent, and a person against whom a petition is filed shall be designated as the defendant.

2. The complaint, petition, notice of inquiry, or order to show cause shall be assigned a docket or file number and the proceedings had thereunder shall thereafter be referred to by such number.

3. The complaint, petition, notice of inquiry, or order to show cause shall be served upon the respondent or defendant by an employee of the Department of Agriculture or by registered mail, return receipt requested. If the respondent or defendant is a corporation, service shall be had upon the present, secretary, treasurer, or statutory agent of the corporation.

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*Appendix 2 to "General Rules and Regulations of the Secretary of Agriculture with respect to Stockyard Owners, Market Agencies, Dealers and Licensees, Effective on and after March 1, 1938" (U. S. Gov't. Printing Office, 1938).

4. When a petition is filed against a stockyard owner, market agency, or dealer, the defendant, if he wishes to deny or explain any of the allegations contained therein, shall file with the Secretary, within 20 days after the receipt of the petition, an answer in duplicate signed by the defendant or his attorney. If the defendant is a corporation the answer shall be signed by the president, secretary, treasurer, or attorney of the corporation. The answer shall be so drawn as fully and completely to state the nature of the defense and shall admit or deny specifically and in detail each material and relevant allegation of the petition. One copy of the answer shall be forwarded by the Secretary to the petitioner.

5. After the expiration of the period for the filing of an answer by a defendant against whom a petition has been filed, the Secretary shall set a time and place for a hearing and shall give due notice thereof to the defendant and to the petitioner.

6. The Secretary shall set a time and place for a hearing upon any complaint, notice of inquiry, or order to show cause issued under the act.

7. The Secretary shall designate an employee of the Department of Agriculture as examiner to conduct the hearing, and such examiner may, in accordance with the rules of evidence applicable to administrative proceedings, admit or exclude any evidence presented and may limit the scope of any evidence admitted. Parties may appear in person or by counsel. All persons who appear at the hearing must conform to the standards of ethical conduct required of practitioners before the courts of the United States.

Except in the case of an order to show cause why an application for license under title V of the act should not be denied, in which case the applicant for license shall proceed first, the party instituting a proceeding shall proceed first at the hearing.

The testimony of the witnesses at the hearing shall be upon oath or affirmation administered by the examiner.

Copies of the records of the Department of Agriculture, certified under the seal of the Department, shall be admissible to the same extent that the original records would be admissible.

The deposition of any witness, taken after reasonable notice to the opposite party and at a time and place and before a person designated for the purpose by the Secretary, shall be admitted if the evidence is otherwise admissible.

Affidavits, if relevant and material, may, in the discretion of the examiner, be admitted, but the Secretary will consider the lack of opportunity for cross-examination in determining the weight that shall be given to such affidavits.

Hearsay evidence may, in the discretion of the examiner, be admitted even though it does not come within any well-recognized exception to the hearsay rule, but the Secretary will determine what weight shall be given to such evidence.

The form of the introduction of evidence shall not be a ground for objecting to such evidence.

When practicable to do so, a copy of each exhibit shall be furnished to the opposing party either before or at the time of its introduction.

Judicial notice, on request, will be taken of such matters as are noticed by the courts of the United States.

If a party objects to the admission of any evidence offered against him or the rejection of any evidence offered by him, or to the limitation of the scope of any evidence introduced by him, he shall state the grounds of such objection. If the objection is overruled, he may take an exception.

8. At the hearing, the Department shall be represented by an attorney designated by the Solicitor of the Department.

9. At the conclusion of the hearing, the examiner shall announce the period of time within which briefs may be filed following the receipt by the respondent or defendant and the petitioner, if any, of the tentative findings of fact and the tentative order, as set out in paragraph 10.

10. The examiner, within a reasonable time after the conclusion of the hearing, shall prepare tentative findings of fact and a tentative order, which shall be served upon, or sent by registered mail to, the respondent or defendant and the petitioner, if any.

11. Within 20 days after the receipt of the tentative findings of fact and the tentative order (unless the time is extended by the Solicitor of the Department of Agriculture), any party who wishes to take exceptions to any matters set out therein shall transmit his exceptions to the Solicitor. At the same time, the party shall transmit a brief statement concerning each of the exceptions to the actions of the examiner at the hearing, as set out in paragraph 7, upon which he wishes to rely. If exception is taken to any tentative finding of fact, reference must be made to the pages or parts of the record relied upon and a corrected finding of fact must be submitted. A party, if he files exceptions, shall state in writing whether he desires to make an oral argument on the exceptions before the Secretary.

12. In the event that an oral argument before the Secretary is requested, a date for such argument shall be fixed by the Secretary or by the Under Secretary or Assistant Secretary, if designated by the Secretary to act in his stead.

13. If oral argument is heard in any proceeding by the Secretary or Acting Secretary, the final order in the proceeding shall be issued by the person who heard the argument.

14. An application for rehearing, reargument, reconsideration, or modification of a final order must be made by petition filed in duplicate with the Secretary. The petition must state specifically the grounds relied upon. A copy of any such application filed by a petitioner or defendant shall be transmitted by the Secretary to the adverse party. In the event that a rehearing is granted by the Secretary, or a hearing is ordered upon a petition for the modification of a final order, the applicable rules of procedure, as set out herein, shall be followed.

This order shall be effective on and after the 28th day of September 1936.

In testimony whereof, I have hereunto set my hand and caused the official seal of the Department of Agriculture to be affixed this 14th day of September 1936.

H. A. WALLACE,
Secretary of Agriculture.

APPENDIX F

(Page 1 of document served with "Order reopening proceeding", dated June 2, 1938—R. 173)

UNITED STATES OF AMERICA

BEFORE THE SECRETARY OF AGRICULTURE

BUREAU OF ANIMAL INDUSTRY DOCKET No. 311

Secretary of Agriculture
vs.
L. B. Andrews, doing business as L. B. Andrews Livestock Commission Company
A. B. Bachman, doing business as A. B. Bachman Livestock Commission Company
W. N. Baucus and Ira Kimmons, a partnership doing business as Baucus & Company
Charles N. Bird
Charles E. Blount, doing business as Charles E. Blount & Company
Frank Boddington, doing business as Frank Boddington Livestock Commission Company
Bowles Livestock Commission Company
Burlington Livestock Commission Company
Henry F. Carnes, doing business as Henry F. Carnes Livestock Commission Company
Cassidy Southwestern Commission Company
John Clay, F. H. Connor, C. A. Klemen, and J. G. Forrest, a partnership doing business as John Clay & Company
Crider Brothers Commission Company
Warren Cummings, doing business as Warren Cummings Livestock Commission Company
W. E. Curtis, doing business as W. E. Curtis & Company
Charles Dixon Commission Company
E. R. Corrigan and Karl N. Soeder, a partnership doing business as Corrigan & Soeder
Drumm Standish Commission Company
Ehrke-Martin Livestock Commission Company
E. W. Elliott and R. K. Swain, a partnership doing business as Elliott, Swain & Company

Tentative Findings of Fact, Conclusion and Proposed Order, issued as of June 14, 1933.

APPENDIX G

(See R. 328)

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI,

WESTERN DIVISION.

FRED O. MORGAN, d/b as F. O. MORGAN SHEEP COMMISSION COMPANY, *et al*,
Petitioners,

vs

THE UNITED STATES OF AMERICA, *et al*,
Respondents.

STATEMENT OF COURT, upon hearing on Motion of Petitioners for order directing the respondents to produce and file record and that petitioners be granted right of inspection of such record,

January 3, 1940.

—o—

The attorney for the defendants, Mr. Wilson, has said here that voluntarily he will deposit with the United States Attorney for the inspection of plaintiff's counsel, in advance of the trial, all the documents characterized by him as "the record" and which he has listed in a letter written to plaintiff's counsel. The court accepts that promise as sufficient, so far as these documents are concerned. We shall expect the defendants to fulfill this pledge not later than Saturday of this week and earlier if possible.

The case has been set for trial on Tuesday, January 9, 1940. The history of that setting is this. Plaintiffs had asked an order that they might take the deposition of the Secretary of Agriculture, one of the defendants. Counsel for the Secretary announced in open court that if the order were not made the Secretary would appear in person for examination as a witness in the case. Upon that representation the motion to take the Secretary's deposition was denied. The case thereafter was set for trial. The date

fixed was not agreeable to the Secretary. At his suggestion and request the date was changed to January 9.

We have no doubt that the Secretary will be here in person for examination as a witness at the trial. He will then be subject to the jurisdiction of the court in the same manner as any other witness or litigant.

The motion now before the court calls for the production not only of the documents which counsel for defendants has offered voluntarily to produce, but also for certain other documents which counsel has described as confidential and privileged interdepartmental communications. Counsel for the defendants has said that he has in his personal possession these documents or copies of them. He has said that they have been turned over by the Secretary of Agriculture to the Department of Justice and to him personally for the express purpose of bringing them within the jurisdiction of this court. We accept that representation also as full face value and we direct counsel for the defendants to have here on January 9 all documents whatsoever, described in the motion and admitted by counsel to be in his personal possession. We consider that it is a possibility that the question of the competency in evidence of some one or more of the documents referred to in the motion may arise at the trial.

With the understanding which we have stated, we overrule the motion. Our task has been made more difficult by the extraordinary course pursued by the attorney for the defendants (we do not, of course, refer to Mr. Wilson)—the announcement read to us, in effect, that if we do not decide this motion in favor of his clients, he will disobey the order of the court and instruct the litigants he represents to disobey it. However deserving of criticism that action is, it does not affect the merits of the motion. The motion is bottomed on Rule 34. It is overruled because it seems clear to the court that it does not satisfy the requirements of that rule. More particularly, we do not consider that there is any such designation of documents to be produced or any such showing of their materiality as is contemplated by the rule.

APPENDIX H

KANSAS CITY, MISSOURI

FIRM INDEX—NUMERICAL

Firm No.	Name
1	Morgan & Company, Fred O.
4	Ragland-Storts and Burrus Commission Company
5	Klecker Sheep Commission Company, Hinie
6	Lewis Flourney Livestock Commission Company
7	Maxwell Commission Company, Grover C.
8	McDonald Livestock Commission Company
9	Nichols Livestock Commission Co., Jno. M.
10	Producers Commission Association
11	Andrews Livestock Commission Co., L. B.
12	Bowles Livestock Commission Company
13	Crider Bros. Commission Company
14	Dixon Commission Company, Chas.
15	Elliott, Swain & Company
16	Farrar Davis & Campbell Commission Company
17	Gladish Livestock Commission Co.
18	Haggart, Wilson Commission Company
19	Interstate Commission Company, W. E. Burrus
20	Kansas City Livestock Commission Company
23	Sanders Commission Company, Fern O.
25	Stuart & Company, C. A.
26	Webster Bros. & Smith Commission Company
29	Stagner, Pierronett & Willis Commission Company
30	Tamblyn Commission Company
33	Carnes Commission Company, Henry F.
34	Cummings Commission Company, Warren
35	Drumm-Standish Commission Company
36	Farmers Union Livestock Commission Company
37	Link Fashen Commission Company
42	Long & Perry Commission Company
43	Knight & Tice Sheep Commission Company

Firm No.	Name
44	Leitch Sheep Commission, Co., W. M.
46	National Livestock Commission Co.
48	Poole-Dempsey, Rutherford Commission Company
51	Kennealey Commission Company, Harry
52	Jefferson, Lowry, Davis Commission Company
53	Ehrke-Martin Commission Company
54	John Clay & Company
55	Ba cus & Company
56	Robinson, Hoover Commission Co.
59	Swift & Henry Commission Co.
60	Thies & Son, H.
61	Knighton, Commission Co., Ham
62	Laird Bros. Commission Company
63	Martin Bros. & Lee Commission Company
65	Moffett Commission Company
66	McCormack L. S. Commission Company, Jay D.
67	Peed Livestock Commission Company, W. H.
70	Kile Livestock Commission Company, W. C.
71	Ryan, Robinson Commission Company
72	Welch Livestock Commission Company
73	Witherspoon Livestock Commission Co.
74	Boddington Commission Company, Frank
75	Curtis & Company, W. E.
76	Greer & Company
77	Inman Hutton Commission Company
78	Land Livestock Commission Company, Walter G.
79	White Livestock Commission Company, Less
82	Wilson, Egan & Company
83	Burlington Commission Company
84	Cassidy Southwestern Commission Company
87	Horner, Dave
88	Kimmons Commission Company, Ira

APPENDIX I*

UNITED STATES DEPARTMENT OF AGRICULTURE
Office of the Solicitor
Washington, D. C.

Nov. 8, 1938

John B. Gage, Esq.,
1007 Bryant Building,
Kansas City, Missouri.

Dear Mr. Gage:

In re: Secretary of Agriculture v. L. B. Andrews, et al., B. A. I. Docket No. 311.

Receipt is acknowledged of your letter of November 5, 1938, relative to the suggestion of the examiner that counsel on both sides furnish suggested findings of fact and proposed order. It appears that it was and still is your position that the examiner should have made rulings upon the exceptions filed to the original tentative order prior to the taking of any evidence in the case. Your exceptions and argument and the additional testimony will all receive consideration by the examiner prior to the time that he renders a tentative report, but no ruling will be made by the examiner before the report is rendered.

You have been informed that the time for filing suggested findings of fact and proposed order by you and other counsel has been extended to December 12, 1938.

Yours very truly,

(Signed) JOHN C. BROOKE
Examiner

*This letter, with its letterhead omitted in printing, appears at R. 429.

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pp. 7-8

SUPREME COURT OF THE UNITED STATES.

No. 640.—October Term, 1940.

The United States of America and Secretary of Agriculture, Appellants,
vs.
Alice M. Morgan, Administratrix of the Estate of F. O. Morgan, Deceased, et al.

Appeal from the District Court of the United States for the Western District of Missouri.

[May 26, 1941.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This case originated eleven years ago. As a result of proceedings begun in April, 1930 under the Packers and Stockyards Act, 42 Stat. 159, 7 U. S. C. § 181 *et seq.*, the Secretary of Agriculture in June, 1933, issued an order setting maximum rates to be charged by market agencies for their services at the Kansas City Stockyards. The market agencies brought suit to set aside his order. The district court issued a temporary restraining order under which amounts charged in excess of the rates fixed by the order were impounded, and later it upheld the order. 8 F. Supp. 766. On appeal here, 7 U. S. C. § 217; 28 U. S. C. §§ 44, 47a, the case was sent back to the district court in order to determine on the issues raised by the pleadings whether the agencies had been denied the "full hearing" demanded by § 310 of the Act. 298 U. S. 468. The district court thereupon decided that this requirement of the statute had been satisfied. 23 F. Supp. 380. The case was again brought here and the order of the Secretary was held invalid because of procedural defects. 304 U. S. 1. Prior to this decision, the Secretary and the market agencies had agreed upon a higher schedule of rates to become effective on December 1, 1937. However, under the impounding order which had continued in effect until that date over half a million dollars had been deposited. The disposition of this fund was made a ground for a petition for re-

hearing after the second *Morgan* decision, but the petition was denied because that question was for the district court. 304 U. S. 23, 26. The Secretary then reopened the original proceedings to determine reasonable rates during the impounding period. Before the Secretary had made a new order the district court directed that the impounded moneys be turned over to the market agencies. 24 F. Supp. 214. The case came here for the third time, and we reversed the district court and required its retention of the fund "until such time as the Secretary, proceeding with due expedition, shall have entered a final order in the proceedings before him". 307 U. S. 183, 198. This decision was rendered on May 15, 1939. A month later the Secretary issued a new schedule of rates for the impounding period based on elaborate findings. Accordingly, the Government moved the district court to distribute the funds in accordance with the Secretary's order, but that court, with one of its three judges dissenting, held the order invalid and directed that the funds be given to the market agencies. 32 F. Supp. 546. The case is now here for the fourth time.

The validity of the Secretary's order has undergone the closest scrutiny in elaborate briefs and extended oral arguments. Nothing has been overlooked. However, in the final stage of this long drawn out litigation, critical examination reveals only a few issues demanding attention.

When the matter was last here we defined the duty of the Secretary. He was to determine reasonable rates for the impounding period so that there could be just distribution of the funds which the court below had taken into its registry. The nature of the problem before the Secretary was a guide to its solution. The Secretary's task was not the usual enterprise of fixing rates for the future, so largely an exercise in prophecy. Unique circumstances made him in 1939 the arbiter of rates for a period between 1933 and 1937. But even such a retrospective determination does not present a mathematical problem. Doubts and difficulties incapable of exact resolution confront judgment. More than that, since the Secretary is the guardian of the public interest in regulating a business of public concern it is not for him merely to reflect the items on a profit and loss statement. He must consider whether these represent services which prop-

erly should be charged to the public. While, therefore, the Secretary in determining rates for the past could not deny himself the benefit of hindsight, he was not merely a bookkeeper posting items into a ledger. Rates to which these public agencies were entitled were not to be derived merely from their expenditures and actual income.

This Court defined the duty of the Secretary in its decision in the 307th U. S. The record leaves no doubt that the Secretary, when he filed his order a month after that decision, appropriately discharged the duty. He served upon the market agencies the order of June 14, 1933, and the findings underlying it as the starting point of the inquiry. The market agencies protested against any order "*nunc pro tunc* as of June 14, 1933", alleged that conditions had changed much since 1933, and asked for the appointment of an examiner to take new evidence. Because he deemed the earlier findings illuminating and helpful "as a working basis for this hearing", the Secretary refused to withdraw them. But he appointed an examiner to hear new evidence and denied "any intention of depriving the respondents of the opportunity of offering evidence concerning conditions affecting the reasonableness of their rates during the period subsequent to June 14, 1933". He further stated that the "forecasts of conditions" in the 1933 order "can now be checked in light of subsequent events". He neither purported to make nor did he make a *nunc pro tunc* order. The Secretary thus adopted a procedure which admitted whatever light was shed by change of circumstances after 1933. The market agencies freely availed themselves of this procedure; and the Secretary's findings leave no room for doubt that his conclusions represent a judgment of 1939 and not a prophecy of 1933. Having overruled the contention of Government counsel that evidence of conditions after 1933 was irrelevant, he took note of the fact that fewer livestock came to the market after 1933; that a larger number came by truck, thereby causing a decrease in the number of animals in an average consignment; that specific as well as general economic factors touching the market at Kansas City had changed; that statistics relevant in 1933 had become outmoded; and that he had before him evidence of expenses for "business getting and maintaining" and salesmanship not before him in 1933. The Secre-

tary thus unequivocally avowed his intention to consider conditions after 1933 and his findings carry out his purpose.[1] We must therefore reject the claim that the Secretary's judgment was founded on the misconception that he must shut his mind to everything that happened after 1933 and in 1939 fix rates in the imaginary world of 1933.

Another attack upon the Secretary's order is the conventional objection that the findings were not rooted in proof. To reexamine here with particularity the extensive findings made by the Secretary and to test them by a record of 1340 printed pages and thousands of pages of additional exhibits would in itself go a long way to convert a contest before the Secretary into one before the courts. Compare *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 578. We have canvassed too fully in the past the duties respectively allotted to the Secretary of Agriculture and the courts in the enforcement of the Packers and Stockyards Act to justify extended discussion of the governing principles. *Tagg Bros.* v. *United States*, 280 U. S. 420; *Acker* v. *United States*, 298 U. S. 426; see also *United States* v. *Morgan*, 307 U. S. 183, 190-91. We are in the legislative realm of fixing rates. This is a task of striking a balance and reaching a judgment on factors beset with doubts and difficulties, uncertainty and speculation. On ultimate analysis the real question is whether the Secretary or a court should make an appraisal of elements having delusive certainty. Congress has put the responsibility on the Secretary and the Constitution does not deny the assignment.

The objection that the proof does not support the findings is really a repetition in disguise of the unfounded claim that the Secretary misconceived his duty and made his order in 1939 as though he were acting in 1933. The bed rock of these variously phrased attacks upon the order is the contention that the Secretary was indifferent to events occurring after 1933. The short answer

[1] Attention is called to the title page of the tentative findings on which appeared, opposite the docket number of the case and the names of the formal parties, the words "Tentative Findings of Fact, Conclusions and Proposed Order, issued as of June 14, 1933". This formal caption is not an unnatural description of the starting point of the Secretary's new inquiry. It clearly is not descriptive of his final findings and order, let alone a denial of the proper theory on which he avowedly proceeded.

is that he was not. The conclusion which he drew from these events is another matter.[2]

Specifically, it is urged that by the increase of rates for the future, to which the market agencies and the Secretary agreed in 1937, changes in circumstances were recognized, while the present order ignored these changes because its rates are at the same level as the original order. But the Secretary did not disregard changed market conditions during the impounding period. Evidence showing these changes was submitted by the market agencies.[3] He was thus duly apprised of the changes and they entered into the findings. To be sure, in ascertaining the reasonable rates for the impounding period he did not attach to them the significance which

[2] That inferences from facts and contentions regarding their significance are the real stuff of these rate determinations is well illustrated by the phase of the problem before the Secretary that was most strongly pressed upon us. It is undisputed that since 1933 the arrival of animals by truck has increased, thereby causing a decrease in the average number of animals in a consignment. And since the consignment is the unit of cost, a decrease in the number of animals results in an increase in cost per head in the consignment. Hence, formal logic concludes, the present order in setting the same rates as those of 1933 fails to reflect this increase in per head cost, and on that ground is invalid. But both the 1933 and 1939 schedules recognize that there are minimal costs unrelated to the number of animals in a consignment. Both orders, therefore, were graduated according to the number of animals in a consignment. The Secretary found that this graduated scale which "produces an increasing per head revenue as the number of head in the consignment decreases" would "give recognition to the changing method of arrival of livestock". Moreover, the decrease in the size of consignments may well have been reflected in the increased estimate of salesmanship cost. All these considerations only illustrate that we are moving in a difficult and specialized realm of judgment which has been entrusted to the Secretary of Agriculture and not to the courts. The Secretary's judgment must prevail since his finding had the support of inferences fairly drawn from the entire evidence, including all that the market agencies saw fit to introduce bearing on their operations after 1933.

[3] An objection to an exclusion of evidence by the examiner requires but slight comment. Two cooperative commission companies had accepted the rates of the Secretary's order of 1933, and the market agencies asked that the annual reports of these companies for the impounding period be produced by the division of the Department of Agriculture with which they were filed. The examiner refused to order production of the reports on the ground that he had no authority to do so, basing his ruling on a section which the Packers and Stockyards Act incorporates from the Federal Trade Commission Act and which provides that it shall be a misdemeanor for any officer of the regulatory agency to make public any information which the agency has obtained "without its authority, unless directed by a court". 7 U. S. C. § 222, 15 U. S. C. § 50. We need not determine whether the reports should properly have been admitted. If they should have been, the statute provides an orderly way for having this done during the course of the hearing by seeking the Secretary's authorization. Having failed to pursue the way of the statute, the market agencies were debarred from raising the matter at a later time.

the market agencies drew from them. As a result of an elaborate study of conditions prior to 1933 and evidence indicating no essential change in those conditions for the purpose at hand during the later years, the Secretary concluded that the market was overstaffed and that in the competitive setting of the business amounts had been spent not justified by that public interest which he is charged to protect. Actual expenses for salesmen's salaries and "business getting", the items chiefly in controversy, he found, did not furnish an adequate guide to the ascertainment of reasonable rates. Had the lower rates originally set by the Secretary in 1933 been tested by experience, audits of the market agencies under these rates would have reflected the practical operation of the policy of lowering costs under controlled conditions. But this source of experience was unavailable because the agencies throughout the impounding period continued to operate under the higher rates. Quite different considerations may properly have influenced the Secretary in fixing rates for the impounding period from those by which he determined a schedule of rates for the future. The existence of the differences is recognized in the agreement between the Secretary and the market agencies whereby the higher rates of the 1937 schedule were to be "without prejudice" either to the Government or to the agencies in the present litigation. It was further agreed in 1937 that after six months, and unless the rate order of 1933 was found invalid, the Secretary could at any time "without further hearing" reduce the rates for the future to the 1933 level. There were very great complexities in determining rates for an industry affected by the unstable conditions which surrounded the Kansas City market in 1937. And the expert tribunal charged with the task may well have felt a need for flexibility in the prophecy involved in setting future rates which did not enter the judgment required in fixing rates for a past period. It is not for us to try to penetrate the precise course of the Secretary's reasoning. Our duty is at an end when we find, as we do find, that the Secretary was responsibly conscious of conditions at the market during the years following 1933, that he duly weighed them, and nevertheless concluded that rates similar to those in the 1933 order were proper.

But the market agencies go beyond saying that the record did not warrant what the Secretary found. They say that bias dis-

qualified him. This serious charge derives from a letter written by the Secretary to the New York Times immediately following the decision of this Court in the second *Morgan* case, 304 U. S. 1. By that decision, the Court had upset the order of 1933 because of procedural defects. Largely because of his assumption that this meant the return of the impounded funds to the market agencies, the Secretary in his letter vigorously criticized the decision. The market agencies in due course moved to disqualify the Secretary in the proceedings started by him to fix new rates. In denying their motion the Secretary wrote a patently sincere denial of bias. He stated that he had complained against a return of the impounded funds to the market agencies prior to a determination of the rates on the merits, that the denial of the petition for rehearing, 304 U. S. 23, 26, had shown him the error of his assumption, that in his letter of criticism he made no prejudgment about the rates to be fixed, and that his only concern was to "see that the substantive rights of the parties are fairly determined". He added that "as a matter of expediency" he might have disqualified himself but for the fact that, while the market agencies were pressing his disqualification, they were simultaneously urging that none other than the Secretary had legal authority to make the rate order. Plainly enough, when it was thus suggested that he create a situation in which no order could be made, the Secretary was offered no escape from his duty even had he preferred to consult the comforts of personal convenience.

But, intrinsically, the letter did not require the Secretary's dignified denial of bias. That he not merely held but expressed strong views on matters believed by him to have been in issue, did not unfit him for exercising his duty in subsequent proceedings ordered by this Court. As well might it be argued that the judges below, who had three times heard this case, had disqualifying convictions. In publicly criticizing this Court's opinion the Secretary merely indulged in a practice familiar in the long history of Anglo-American litigation, whereby unsuccessful litigants and lawyers give vent to their disappointment in tavern or press. Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline,

capable of judging a particular controversy fairly on the basis of its own circumstances. Nothing in this record disturbs such an assumption.

And so we conclude that the order of the Secretary furnishes "the appropriate basis for action in the district court in making distribution of the fund in its custody". *United States* v. *Morgan*, 307 U. S. 183, 198. But, finally, a matter not touching the validity of the order requires consideration. Over the Government's objection the district court authorized the market agencies to take the deposition of the Secretary. The Secretary thereupon appeared in person at the trial. He was questioned at length regarding the process by which he reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates. His testimony shows that he dealt with the enormous record in a manner not unlike the practice of judges in similar situations, and that he held various conferences with the examiner who heard the evidence. Much was made of his disregard of a memorandum from one of his officials who, on reading the proposed order, urged considerations favorable to the market agencies. But the short of the business is that the Secretary should never have been subjected to this examination. The proceeding before the Secretary "has a quality resembling that of a judicial proceeding". *Morgan* v. *United States*, 298 U. S. 468, 480. Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that "it was not the function of the court to probe the mental processes of the Secretary". 304 U. S. 1, 18. Just as a judge cannot be subjected to such a scrutiny, compare *Fayerweather* v. *Ritch*, 195 U. S. 276, 306-07, so the integrity of the administrative process must be equally respected. See *Chicago, B. & Q. Ry.* v. *Babcock*, 204 U. S. 585, 593. It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other. *United States* v. *Morgan*, 307 U. S. 183, 191.

Reversed.

Mr. Justice REED did not participate in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 640.—October Term, 1940.

The United States of America and Secretary of Agriculture, Appellants, *vs.* Alice M. Morgan, Administratrix of the Estate of E. O. Morgan, Deceased, et al.	Appeal from the District Court of the United States for the Western District of Missouri.

[May 26, 1941.]

Mr. Justice Roberts.

With much that is said in the opinion of the Court I agree, but I am compelled to dissent from the conclusion. Despite the fact that this litigation has extended over many years I still think that not only the rights of the market agencies but the principles involved require the Court to take care that the litigation is disposed of in accordance with the principles it has laid down. The result now reached is not in accordance with those principles. A recital of the course of the litigation is necessary for an understanding of the case as now presented.

Rates for the market agencies at Kansas City were fixed by the Secretary of Agriculture[1] July 24, 1923. By virtue of the statute these became the legal rates and the agencies were bound not to exceed them until the further order of the Secretary. April 7, 1930, the Secretary instituted an inquiry into the existing rates. June 14, 1933, he issued an order reducing them.

July 19, 1933, the market agencies brought suit to enjoin and set aside the order. The District Court entered a temporary injunction July 22, 1933, in connection with which it provided that the difference between the rates being charged by the agencies and those fixed by the order under attack should be impounded pending the outcome of the litigation. Upon the trial of the cause the

1 Several incumbents of the office acted in the case at successive dates. The term Secretary is used to designate the official who acted in any instance.

court refused to consider an issue tendered by the agencies as to whether the Secretary had granted them a full hearing. Upon examination of the record, it held the order was supported by substantial evidence and, on October 29, 1934, dismissed the bill.[2] This Court reversed, on May 25, 1936, holding that the District Court should have considered and decided the question whether the agencies had been afforded a full hearing.[3]

On a further trial the District Court again upheld the order by a decree of July 2, 1937.[4] The United States appealed from this decree. In the meantime, however, a significant thing occurred. On November 14, 1937, the Secretary approved new rates, effective November 1, 1937, in recognition of changed conditions existing in the business at Kansas City. The impounding order, therefore, ceased to operate November 1, 1937.

This Court reversed the second decree of the District Court because it found that the agencies had been denied a full hearing in the proceedings which eventuated in the order of 1933. Its decision was rendered April 25, 1938, and a rehearing was denied May 31, 1938.[5]

The Secretary and his legal advisers evidently believed, and, as I think, correctly, that the old rates authorized in 1923 stood until a new order, lawfully made, superseded them for the future. The rates fixed for the future by the order of 1933 had not become effective and the Act contained no provision for altering rates charged in the past under authority of the existing and outstanding order of 1923, or granting reparation in respect of them. The Secretary seems to have thought that he could reach this situation by the entry of a *nunc pro tunc* order *as of* July 14, 1933. On June 2, 1938, therefore, he directed that the proceeding be reopened and that the "proceedings, findings of fact, conclusion and order" issued on June 14, 1933, be served upon the agencies as the "Tentative Findings of Fact, Conclusion and Proposed Order" of the Secretary, and he denominated them as "Tentative Findings of Fact, Conclusion, and Proposed Order" *issued as of June 14, 1933.* It is plain that he proposed thus to cure what had been

[2] 8 F. Supp. 766.
[3] 298 U. S. 468.
[4] 23 F. Supp. 380.
[5] 304 U. S. 1, 23.

found to be the defect in the order by affording the market agencies an opportunity to file and argue exceptions, in an effort to show any infirmity in the findings and conclusion on which the 1933 order was based. If none was made to appear, he proposed to issue the order *nunc pro tunc* as of its original date. It is true that after exceptions were filed and upon the hearing before an examiner the agencies were permitted to offer evidence to show changed conditions supervening in the period between 1933 and 1937. It is also true that while the examiner retained all of the findings previously made as the foundation for the order of 1933 he added certain findings but he did not, in any material respect, alter the ultimate findings and, indeed, he retained the exact rates fixed in the earlier order and left undisturbed every finding as to cost (with one immaterial exception), even to the fourth decimal place, as it had stood in the original report.

Immediately after the reopening of the proceeding consequent upon the decision of this Court of May 31, 1938, the Secretary, on June 12, 1938, applied to the District Court for an order staying the distribution of the impounded funds pending his further decision and order. In his petition he said: "After a full hearing the Secretary will determine by an order as of June 14, 1933, what rates may reasonably be charged by petitioners to their clients for the services rendered them." The District Court denied the application.[6]

The United States appealed from the decree. In its brief it stated "The only purpose and effect . . . . [of the reopened proceeding] is to determine whether and to what extent the appellees have been prejudiced by the procedural defect in the earlier proceeding."

Before the case had been decided here the reopened proceeding before the Secretary had so progressed that the evidence had been closed, a tentative report made by an examiner, exceptions filed, and argument heard by the Secretary. The record plainly discloses that up to the time of our final decision on this last appeal the Secretary had been content to take the data disclosed by his investigation of the market agencies' activities in the years 1929, 1930 and 1931, as the basis of any order and this was natural if, as he

[6] 24 F. Supp. 214.

then supposed, he was justified in entering an order *nunc pro tunc* as of the date of his original 1933 order.

This Court rendered its opinion in the last appeal May 15, 1939.[7] Speaking by a majority, the Court there held that as the District Court was acting as a court of equity in the premises the impounded funds should be disbursed according to the equities of the situation. It adverted to the fact that the rates fixed by the Secretary October 14, 1937, governed for the future until altered in accordance with law, but it held that the equities of the case required an investigation as to whether the rates charged in the interval between 1933 and 1937 had been unreasonable and, as a result, whether it would be inequitable to withhold from the market agencies' customers and return to the market agencies all or any part of the impounded fund. The court was of the view that the Secretary was in a peculiarly favorable position to find the facts and advise the court upon this subject and that the court ought to cooperate with the Secretary to attain a just result.

At this juncture the reopened proceeding was under submission before the Secretary. It is to be noted that he had refused to consider the data in his own possession with respect to the actual experience of two of the market agencies which had conformed to the rates he fixed in 1933. It is further to be noted that the existence of changed conditions not only is shown by the uncontradicted evidence offered by the agencies but by the fact that the Secretary recognized such change in making his order of October 14, 1937.

The court below has found that conditions in the business had substantially, and in some respects radically changed since the completion of the original record on which the 1933 order was based. The court found the facts as to the changes which had increased the cost of doing the business. The government does not question the correctness of these findings. I think these increased costs cannot be ignored or dismissed with the comment that the Secretary considered them, when it is plain he did not. This Court did not intend by its decision in 1939 that the Secretary should shut his eyes to these changed conditions, and make a forecast in 1939 *as of 1933* and upon the data available in 1933, as if he had before him only the experience prior to 1933 and were then acting. Of a similar situation this Court has said: "A forecast

[7] 307 U. S. 183.